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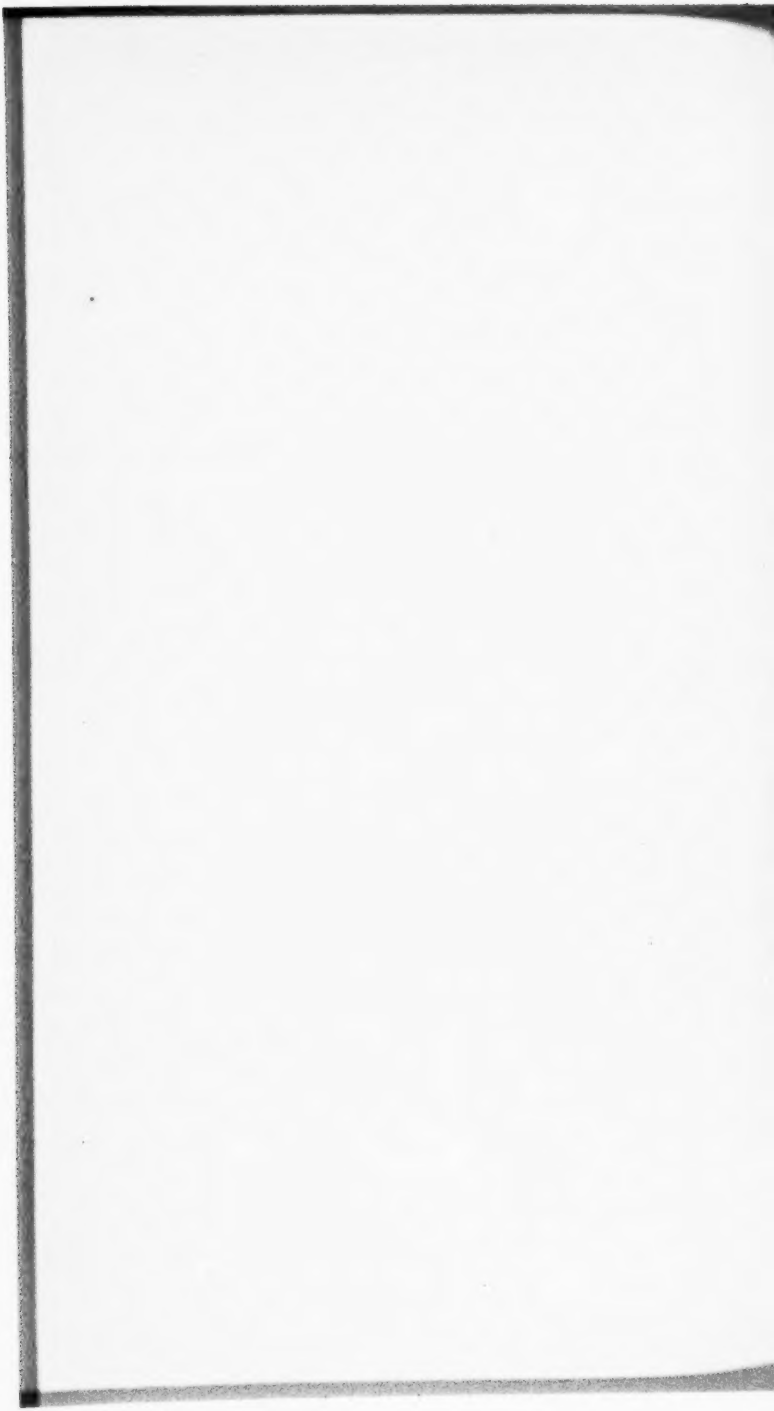

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,

v.

No. 118

MARY EDNA BEAHAM,
Defendant in Error.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

MOTION TO DISMISS WRIT OF ERROR.

Comes now the defendant in error, by her counsel appearing in that behalf, and moves this court to dismiss the

writ of error in the above entitled cause for want of jurisdiction, no Federal question being involved therein.

JUSTIN D. BOWERSOCK,
ROBERT B. FIZZELL,
Attorneys for Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF FACTS.

This action was instituted by the defendant in error to recover the value of a trunk and its contents checked for her by the plaintiff in error for transportation from New York to Kansas City, and lost in transit.

The defendant in error (hereinafter referred to as the plaintiff), on September 9, 1910, went to the Grand Central Station, New York City, purchased a first-class ticket for Kansas City over the lines of the plaintiff in error (hereinafter referred to as the defendant), the Michigan Central Railroad, and the Atchison, Topeka and Santa Fe Railroad, and checked her trunk from New York to Kansas City over the same route. The trunk was lost in some way, either in the Grand Central Station or in transit, and was never delivered to plaintiff.

On February 21, 1911, plaintiff instituted this action in the Circuit Court of Jackson County, Missouri, to recover the value of her baggage thus lost.

The defendant's answer set up provisions contained in the ticket sold plaintiff and in the baggage check given her, by which defendant's liability for baggage was limited to $100 unless a greater value was declared and paid upon. (Record, p. 7.) The answer also alleged that during the month of September, 1910, defendant had published and

l in the office of the Interstate Commerce Commission ain tariffs which contained the terms and conditions on ch defendant would receive and carry baggage, and by ch defendant's liability for baggage on interstate ship- nts was limited to $100 unless the passenger expressly pulated for a greater value and paid charges thereon in ordance with the schedules appearing in said tariffs. ecord, pp. 8-11.)

The plaintiff's reply denied that said tariffs and sched- s were published and filed with the Interstate Commerce mmission and in full force and effect as alleged by de- dant. (Record, p. 13.)

The case was tried before the court without a jury. At trial, the defendant offered in evidence certain papers rporting to be copies of tariffs and schedules filed by it th the Interstate Commerce Commission. These papers ntained the conditions governing defendant's liability for ggage as pleaded in its answer. The plaintiff objected to e introduction of all of these purported copies on the ound that they were not properly certified. (Record, pp. -38, 49, 58, 65, 68.) They were certified by the chairman the Interstate Commerce Commission. (Record, pp. 36, 8, 67). The certificates did not purport to show that said airman was the custodian of the records of the Commis- on, and in one instance (Record, p. 58) the certificate did ot even recite that the original was on file with the Com- ission.

The trial court postponed ruling on the admissibility of ese papers, saying that the question could be taken up in he briefs of counsel. (Record, p. 33.) The court there- fter overruled all of plaintiff's objections to evidence Record, p. 73), but gave an unqualified declaration of law hat the plaintiff was entitled to recover the reasonable value of her trunk and its contents. (Record, p. 74.) Judg-

ment was accordingly rendered for plaintiff in the sum o $1771.52. (Record, p. 14.)

The trial court did not find that the tariffs and schedules relied upon by defendant to limit its liability were duly published and filed with the Interstate Commerce Commission and in full force and effect in September, 1910. The defendant, in its declaration of law numbered III (Record pp. 75-77) requested the court to make such a finding, but the court refused. The court did declare, however, that "even if" the tariffs were properly filed and posted, the plaintiff would still be entitled to recover the reasonable value of her baggage. (Declaration of law No. 4, Record

The defendant appealed from the judgment of the circuit court to the Kansas City Court of Appeals, which affirmed the judgment for plaintiff in an opinion by Judge Ellison found on pages 88 to 93 of the Record.

The binding effect upon the state court of the decision in *Boston & Maine Railroad* v. *Hooker*, 233 U. S., 97, was never questioned by plaintiff nor is it properly an issue now in this cause. Its force was expressly recognized in the opinion in the state court. (Record, p. 91) The sole question presented and decided in the Kansas City Court of Appeals is, did the circuit court correctly give the first and peremptory declaration of law for plaintiff, shown at page 74 of the Record? This declaration is as follows:

> "The court declares the law to be that under the pleadings and the evidence in this case, plaintiff is entitled to recover from the defendant an amount which represents the reasonable value of her trunk and the reasonable value of such articles contained therein as constituted baggage."

The defendant attacked this peremptory instruction for plaintiff on the ground that the circuit court had disre-

garded the tariffs and schedules limiting defendant's liability for baggage. The plaintiff, on the other hand, contended that the trial court properly disregarded them in arriving at its decision, because the papers offered were not properly certified copies and were, therefore, not admissible in evidence. This question was briefed and argued upon its merits in the Kansas City Court of Appeals where the plaintiff's position was sustained and it was held that the papers offered were in fact incompetent. The judgment of the circuit court which disregarded the conditions and limitations of liability contained in the tariffs was therefore affirmed. The decision of the Kansas City Court of Appeals was based wholly on the inadmissibility of evidence.

This question of evidence, decided against defendant in the Kansas City Court of Appeals, namely, "Were the purported copies of defendant's tariffs admissible in the state court?" defendant now asks this court to pass upon. Defendant contends that under a provision of Section 16 of the Interstate Commerce Act, as amended June 29, 1906, (34 Stat. at L., 584, Chap. 3591) and June 18, 1910, (36 Stat. at L., 539, Chap. 309) the papers offered were properly certified and were admissible in evidence. The provision reads as follows:

> "The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of or extracts from

any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals."

Defendant contends that under this provision of the Interstate Commerce Act the papers offered as copies of defendant's tariffs, bearing the certificate of the Chairman of the Commission, were admissible in evidence and could not be disregarded. We shall contend, on the contrary, that under the statute, such papers were not properly certified, were inadmissible in evidence, and were rightly disregarded by the state court.

Before reaching these contentions, however, there is a preliminary question which we regard as decisive. In the brief for the defendant upon the merits, counsel have assumed that the statutory provision referred to above applies to the state courts, and have urged that the ruling of the Kansas City Court of Appeals therefore involves a Federal question over which this court has jurisdiction. We desire by the present motion to question the correctness of that assumption, to submit that the statute does not apply and that therefore no Federal question is involved in this cause, and to ask that the writ of error be dismissed.

POINTS AND AUTHORITIES.

I.

If the sole issue in this case is the correctness of the decision of the Kansas City Court of Appeals upon a question in the law of evidence, apart from any Federal statute, this court does not have jurisdiction.

St. Louis I. M. & So. Ry. Co. v. *Taylor,* 210 U. S., 281, l. c. 291.

II.

The provision in the Interstate Commerce Act making copies of tariffs and schedules filed with the Commission receivable in evidence when certified by the Secretary under the Commission's seal, does not apply to the state courts.

34 U. S. Sts. at Large, 584, Chap. 3591;
36 U. S. Sts. at Large, 539, Chap. 309;
Clemens v. *Conrad,* 19 Mich. 170, l. c. 178, 179;
Carpenter v. *Snelling,* 97 Mass., 452, l. c. 458;
Griffin v. *Ranney,* 35 Conn., 239, l. c. 240;
Haight v. *Grist,* 64 N. C., 739, l. c. 741, 742;
Duffy v. *Hobson,* 40 Cal., 240, l. c. 243;
Stewart v. *Hopkins,* 30 Oh. St., 502, l. c. 525;
Davis v. *Richardson,* 45 Miss., 499, l. c. 505, 506;
Wade v. *Foss,* 96 Me., 230, l. c. 231, 232;
Weltner v. *Riggs,* 3 W. Va., 445;
Knox v. *Rossi,* 25 Nev., 96;

Woodward v. *Roberts,* 58 N. H., 503;
Cassidy v. *St. Germain,* 22 R. I., 53;
Kennedy v. *Roundtree,* 59 S. C., 324;
Wilson v. *McKenna,* 52 Ill., 43;
Garland v. *Gaines,* 73 Conn., 662;
Trowbridge v. *Addoms,* 23 Colo., 518;
Rowe v. *Bowman,* 183 Mass., 488;
Davis v. *Evans,* 133 N. C., 320;
Watson v. *Mirike,* 25 Tex. Civ. App., 527;
Colby v. *Cleaver,* 169 Fed., 206.

This rule of construction is followed by this court wit reference to the first ten amendments to the Constitution o the United States.

Eilenbecker v. *District Court of Plymouth County Iowa,* 134 U. S., 31;
Twitchell v. *Commonwealth,* 7 Wallace, 321;
Barron v. *Mayor of Baltimore,* 7 Peters, 243;
Fox v. *State of Ohio,* 5 Howard 410, l. c. 434.

III.

If the provision in the Interstate Commerce Act making certified copies of tariffs filed with the Commission admissible in evidence was intended by Congress to apply to the state courts, the provision is not binding. Congress has no power to prescribe rules of evidence for the state courts under the facts in this case.

Duffy v. *Hobson,* 40 Cal., 240, l. c. 243;
Sporrer v. *Eifler,* 1 Heisk. (48 Tenn). 633, l. c. 637-638;

Small v. Slocomb, 112 Ga., 279 l. c. 281;
Bumpass & Hicks v. *Taggart,* 26 Ark., 398;
Insurance Companies v. *Estes,* 106 Tenn., 472;
Davis v. *Richardson,* 45 Miss., 499;
Griffin Lumber Co. v. *Myer,* 80 Miss., 435;
Craig v. *Dimock,* 47 Ill., 308;
Richards v. *Roberts,* 195 Ill., 27;
Amos-Richia v. *Northwestern Mutual Life Ins. Co.,* 143 Mich., 684;
Wallace v. *Cravens,* 34 Ind., 534;
Wade v. *Foss,* 96 Me., 230;
People ex rel. Barbour v. *Gates,* 43 N. Y., 40;
Moore v. *Moore,* 47 N. Y., 467;
Jacobs v. *Spofford,* 34 Tex., 152;
Forcheimer v. *Holly,* 14 Fla., 239;
Dawson v. *McCarty,* 21 Wash., 314;
More v. *Clymer,* 12 Mo. App., 11;
King v. *Phoenix Ins. Co.,* 195 Mo., 290, 309;
Wharton on Evidence, Sec. 697.

IV.

The Kansas City Court of Appeals did not rule against the defendant upon the construction of any Federal statute or the existence of any Federal right. That court admitted the right claimed by defendant but found that defendant had failed to prove the facts necessary to bring the case within the operation of that right. Such decision does not involve a Federal question.

Smith v. *Adsit,* 23 Wallace, 368, l. c. 373, 374;
Mining Company v. *Boggs,* 3 Wallace, 304, l. c. 310;
Crary v. *Devlin,* 154 U. S., 619.

BRIEF OF ARGUMENT.

I.

If the sole issue in this case is the correctness of the decision of the Kansas City Court of Appeals upon a question in the law of evidence, apart from any Federal statute, this Court does not have jurisdiction.

No question of substantive law or involving the substantive rights of the parties was passed upon by the Kansas City Court of Appeals. The decision of the court was that papers purporting to be copies of defendant's tariffs and schedules were inadmissible in evidence because not properly certified. Clearly, unless the decision of the state court was contrary to the provisions of a Federal statute concerning evidence which the state court was bound to observe, the case does not involve a Federal question. As was said in the case of *St. Louis, I. M. & So. Ry. Co.* v. *Taylor*, 210 U. S., 281, l. c. 291,

> "But we have not the power to correct mere errors in the trials in state courts, although affirmed by the highest state courts. This court is not a general court of appeals with general right to review the decisions of state courts."

That this court is not concerned with the correction of any supposed errors of the state courts in determining questions of general law, has been established since the time of Chief Justice Marshall. Consequently, if the case at bar,

brought here on error to a state court, involves only the general principle in the law of evidence governing the admissibility of purported copies of railway tariffs certified in one way or another, the matter is one of state, not Federal concern. Unless the defendant can show that by virtue of the Federal Constitution or statutes it was entitled to have these purported copies admitted in evidence, it has no standing in this court. For this reason, defendant sets up the provisions of Section 16 of the Interstate Commerce Act, and insists that such purported copies were admissible under it and that the ruling of the state court excluding them involves a Federal question. If, therefore, Section 16 does not apply, this court has no jurisdiction.

II.

The provision in the Interstate Commerce Act making copies of tariffs and schedules filed with the Commission receivable in evidence when certified by the secretary under the Commission's seal, does not apply to the state courts.

Section 16 of the Interstate Commerce Act of 1887, as amended June 29, 1906 (34 U. S. Sts. at Large, 584, Chap. 3591) and June 18, 1910 (36 U. S. Sts. at Large, 539, Chap. 309) contains the following provision:

> "The copies of schedules and classifications and tariffs * * * * filed with the commission as herein provided, * * * * shall be preserved as public records in the custody of the secretary of the commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of or extracts from any of said schedules, classifications, tariffs, * * * certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals."

This provision does not expressly apply to the state courts. Nor is there anything in the Act which even impliedly indicates that Congress intended to attempt to regulate the trial of cases in such courts, or to prescribe the rules of evidence therein. Therefore, it must be construed as prescribing rules of evidence only for the Federal tribunals which are under the exclusive jurisdiction of Congress. This question of construction has frequently arisen in reference to the revenue stamp laws passed by Congress. These Acts have always provided in substance that no unstamped instruments required by law to be stamped should be "recorded or admitted or used in evidence *in any court.*" It has become firmly established as a rule of statutory construction that although the phrase "in any court" is general in its terms, it is intended when used by Congress in prescribing rules of evidence to apply only to the Federal tribunals.

The opinion of Chief Justice Cooley in *Clemens* v. *Conrad,* 19 Mich., 170, is especially in point. Speaking of the provision in the Revenue Act of 1866 forbidding the admission in evidence "in any court" of an unstamped instrument, the court, by the Chief Justice said (pp. 178, 179):

> "In attempting properly to construe it, it is proper to bear in mind the position of the body which enacted it relatively to the different legal tribunals of the country. Congress creates the courts which operate within the sphere of federal sovereignty, and administer the judicial power conferred by the Constitution of the United States. For them it prescribes rules of evidence, and may establish a course of practice. It has no such general power as regards the state courts. Those courts have another origin, and their rules of evidence, and courses of proceeding are prescribed by a different legislative body. Waiving, in the present case, any discussion of the question whether the State Courts are not agencies of state government which are

beyond the sphere of the taxing power of the nation, and fully at liberty to investigate in their own modes, under the laws of the state, the questions of fact which are put in issue before them, we think it a just and reasonable interpretation of the law of Congress, that the courts which are precluded from receiving unstamped instruments in evidence, are only the Federal courts, which are created under the general government, and for which Congress has general power to prescribe rules of evidence. In other words, we think that a rule of evidence laid down in general terms, is to be understood as applicable to those courts only for which the legislature prescribing it has general power to make rules, and not to other courts not expressly named, over which it has no such general power, and with whose proceedings it could interfere, if at all, only in exceptional cases."

The same rule of construction was laid down by Chief Justice Bigelow in delivering the opinion of the court in the case of *Carpenter* v. *Snelling,* 97 Mass., 452, a case arising under the Revenue Act of 1866. The court held (p. 458):

"The provision of the statute of the United States already cited does not in terms apply to the courts of the several states. The language of the enactment is only that no instruments or documents not duly stamped shall 'be admitted or used as evidence in any court' until the requisite stamps shall be affixed. This provision can have full operation and effect if construed as intended to apply to those courts only which have been established under the Constitution of the United States and by Acts of Congress, over which the Federal legislature can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. We are not disposed to give a broader interpretation to the statute. We entertain grave doubts whether it is within the constitutional authority of Congress to enact

rules regulating the competency of evidence on the trial of cases in the courts of the several states, which shall be obligatory upon them. We are not aware that the existence of such a power has even been judicially sanctioned. There are numerous and weighty arguments against its existence. We cannot hold that there was an intention to exercise it, where, as in the provision now under consideration, the language is fairly susceptible of a meaning which will give it full operation and effect within the recognized scope of the constitutional authority of Congress."

The same phrase "in any court" was considered in *Griffin* v. *Ranney*, 35 Conn., 239, and the same conclusion was reached, the court saying (p. 240):

"We are not aware of any attempt on the part of the legislature of any state to direct, or in any way interfere with, the course of proceeding and the administration of justice in the federal courts; nor, on the other hand, has Congress ever claimed the right by direct legislation to regulate the course of proceedings generally in the courts of the several states.

So far then as the act in question prescribes rules regulating the competency of evidence in courts of justice, it must be presumed that it was intended to apply only to those courts over which Congress had acknowledged and constitutional power, especially as the language of the act is fairly susceptible of that interpretation."

In *Haight* v. *Grist*, 64 N. C., 739, l. c. 741, 742, the court said:

"It is therefore in accordance with long settled and widely extended rules of constitutional construction that the general expression *'any court'* which is found in this statute of the United States, means only *'any court of the United States,'* and does not include courts

of the respective states. • • • We are therefore under no necessity of discussing the *power* of Congress to devolve upon state courts the duty of protecting the revenue of the United States, or its power to affect the laws of evidence as previously administered in such courts."

The rule of construction laid down above has likewise been approved in the following cases which deal with the words "in any court" as found in the revenue laws of Congress:

Duffy v. *Hobson*, 40 Cal., 240, l. c. 243;
Stewart v. *Hopkins*, 30 Oh. St., 502, l. c. 525;
Davis v. *Richardson*, 45 Miss., 499, l. c. 505, 506;
Wade v. *Foss*, 96 Me., 230, l. c. 231, 232;
Weltner v. *Riggs*, 3 W. Va., 445;
Knox v. *Rossi*, 25 Nev., 96;
Woodward v. *Roberts*, 58 N. H., 503;
Cassidy v. *St. Germain*, 22 R. I., 53;
Kennedy v. *Roundtree*, 59 S. C., 324;
Wilson v. *McKenna*, 52 Ill., 43;
Garland v. *Gaines*, 73 Conn., 662;
Trowbridge v. *Addoms*, 23 Colo., 518;
Rowe v. *Bowman*, 183 Mass., 488;
Davis v. *Evans*, 133 N. C., 320;
Watson v. *Mirike*, 25 Tex. Civ. App., 527.

The decisions referred to above which establish the principle that when Congress prescribes rules of evidence in general terms, such rules will be construed to apply only to the Federal courts, is in accord with the decisions of this court that the amendments to the Constitution of the United

States, which secure fundamental rights in certain judicial proceedings, apply only to proceedings in the courts of the United States. Although phrased in general language, they do not govern the administration of justice in the state courts.

Eilenbecker v. *District Court of Plymouth County, Iowa*, 134 U. S., 31;
Twitchell v. *Commonwealth*, 7 Wallace, 321;
Barron v. *Mayor of Baltimore*, 7 Peters, 243;
Fox v. *State of Ohio*, 5 Howard, 410, l. c. 434.

A similar rule of construction has been adopted in the Federal Court as to a state statute prohibiting in general terms the institution of suits. In *Colby* v. *Cleaver*, 169 Fed., 206, the court construed the Idaho statute requiring certain foreign corporations to perform certain conditions and providing that corporations failing to do so could not maintain actions "in any court of this state." It was held that the phrase referred only to the state courts over which the state legislature had unquestioned jurisdiction, and was not intended to apply to the Federal courts of Idaho.

We submit, therefore, that the provision of Section 16 of the Interstate Commerce Act prescribing the form of certification of copies of tariffs on file with the Commission, and making copies so certified admissible in evidence "in all judicial proceedings," applies exclusively to the Federal tribunals and does not limit or bind the state courts. This construction of the Act gives effect to the expressed intent of Congress, and avoids all question as to the power of Congress to prescribe rules of evidence for the state courts. It follows that the Kansas City Court of Appeals was not bound by the Federal statute. The question of the admissi-

ity of the purported copies of defendant's tariffs offered evidence is merely an issue of general law, and cannot in any view a Federal question.

III.

If the provision in the Interstate Commerce Act making rtified copies of tariffs filed with the Commission admissible evidence was intended by Congress to apply to the state urts, the provision is not binding. Congress has no power prescribe rules of evidence for the state courts under the cts in this case.

We believe, as we have heretofore urged, that this pro- ision applies only to the Federal courts, and that the ques- on of the *power* of Congress to prescribe rules of evidence the state tribunals is not involved in this case. As a *atter of construction*, the provision does not refer to ju- ial proceedings in the state courts. If it be held, however, at the statute applies to the Federal and state courts ke, then the provision, so far as it relates to the state urts, is of no effect, for such legislation is beyond the wer of Congress. The Constitution of the United States ll be searched in vain for any express or implied delega- on to Congress of authority so as to regulate the judicial ocedure of the states.

It is true that under Article IV, Section 1, of the Con- itution, each state is bound to give full faith and credit the public acts, records and judicial proceedings of every her state, and Congress is given power to prescribe by neral law the manner in which such acts, records and pro- edings shall be proved, and the effect thereof. But the

Constitution does not authorize Congress to prescribe the manner of proving papers in the state courts *when such papers are not the public records of a sister State.* The tariffs referred to in the Interstate Commerce Act are filed in the office of the Interstate Commerce Commission under the custody of the secretary, and are not public acts, records or judicial proceedings of any other state. They do not come within the class of documents referred to, and said section, therefore, does not authorize congressional action concerning them. Indeed, the express provision granting power to Congress to act with regard to the records of other states would seem to exclude any implied power along other similar lines. Since the states are "separate and distinct sovereignties," within the limits of the powers not specifically granted to the general government, Congress cannot prescribe the manner of proving such tariffs in the state courts.

Nor can it be contended that the clause of the Constitution entrusting to Congress control over interstate commerce, delegates power to legislate upon the question now presented. That question is entirely unrelated to interstate commerce. It is admitted freely that the rights and liabilities of the parties to this litigation are governed exclusively by the Federal statutes. It is not disputed that if the tariffs were properly filed and published under the Act of Congress, plaintiff's recovery is limited as therein provided. We will concede that if the question were whether or not the tariffs were properly filed and published, such question would involve a construction of the Interstate Commerce Act. In this case, however, the state courts have considered none of these matters, and have decided nothing with regard to the force or effect of the Act, or with re-

gard to the propriety or impropriety of a filing and publication thereunder. They have decided simply that the tariffs were not proved according to the requirements of the state courts in Missouri. They have passed upon no question but this—Under what conditions as to certification may copies of papers be received in evidence, without the testimony of a witness produced and sworn and subject to cross examination in open court? To hold that this question of general law is within the scope of a delegation of power to regulate interstate commerce and that by reason of such delegation Congress may prescribe rules of procedure for state courts, "would be to admit the right of Congress to control the materials on which the decisions of the courts of particular states should be based." Wharton on Evidence, Sec. 697, quoted in *Insurance Companies* v. *Estes*, 106 Tenn., 472, 484. It cannot be assumed that the states gave away by implication a power so essential to the independence of their courts. Congress might properly, under this clause, reserve jurisdiction of all cases involving interstate commerce to the Federal courts, but it might not dictate the procedure in such cases if left to the state courts.

It has been held in other fields surrendered to Congress that the states have not given up their right to control the admission of evidence in their own courts. The power of the national government to raise revenue for its own maintenance is as vital as any power entrusted to it, yet the decisions are uniform that the authority of Congress to impose a stamp tax upon contracts, promissory notes and similar instruments does not authorize it to prohibit the admission in evidence in the state courts of unstamped instruments.

Thus, in the case of *Duffy* v. *Hobson*, 40 Cal., 240, the court held (p. 243):

> "But if the Act of Congress under consideration had in terms embraced the state courts within its provisions, and had enacted that upon a trial held in one of those courts, a contract or other instrument of evidence, otherwise admissible, should not be admitted in evidence except upon compliance with its provisions, it would be our duty to declare its provisions in that respect null and void.
>
> Congress has no constitutional authority to legislate concerning the rules of evidence administered in the courts of this state, nor to affix conditions or limitations upon which those rules are to be applied and enforced."

In the similar case of *Sporrer* v. *Eifler*, 1 Heisk., (48 Tenn.) 633, the court said: (pp. 637-638):

> "The courts of the States do not exist by the authority of the United States, or by its permission, and are not objects over which its sovereign power extends, except, perhaps, for the purpose of protection. It does not possess over them even the incidental power of taxation.
>
> The people of the states possess all the powers of their original unlimited sovereignty, except such as have been delegated by them to the government of the United States, or are prohibited to the States by the Constitution. * * * There has been no delegation by the States to Congress of power or authority to legislate for the internal regulation of the States, nor are the people of the States prohibited by the Constitution from creating and regulating the courts of the states and the rules for their government. The legislature of the state is the only power which can enlarge or contract the rules of evidence or create and enforce new rules in the courts of the State."

In *Small* v. *Slocumb,* 112 Ga., 279, the same conclusion was reached after an exhaustive examination of the cases. The court, speaking through Chief Justice Simmons, said (p. 281):

> "After much reflection, and a careful and thorough investigation of cases in the courts of other states, we have come to the conclusion, however, that Congress has no power to prescribe rules of evidence for a state court. Under our system of government, the states retained all powers of sovereignty which were not granted to the general government by the Constitution. They had the power to create and establish their own courts, and to regulate the practice and procedure and to prescribe rules of evidence therein. There is nothing in the Constitution of the United States which expressly or by implication gives to Congress the power to prescribe rules of evidence for the courts of the states."

The power of Congress to prescribe rules of evidence for the state courts in connection with the revenue laws is likewise denied in the following cases:

Bumpass & Hicks v. *Taggart,* 26 Ark., 398;
Insurance Companies v. *Estes,* 106 Tenn., 472;
Davis v. *Richardson,* 45 Miss., 499;
Griffin Lumber Co. v. *Meyer,* 80 Miss., 435;
Craig v. *Dimock,* 47 Ill, 308;
Richards v. *Roberts,* 195 Ill., 27;
Amos-Richia v. *Northwestern Mutual Life Ins. Co.,* 143 Mich., 684;
Wallace v. *Cravens,* 34 Ind., 534;
Wade v. *Foss,* 96 Me., 230;

People ex rel. Barbour v. *Gates,* 43 N. Y., 40;
Moore v. *Moore,* 47 N. Y., 467;
Jacobs v. *Spofford,* 34 Tex., 152;
Forcheimer v. *Holly,* 14 Fla., 239;
Dawson v. *McCarty,* 21 Wash., 314;
More v. *Clymer,* 12 Mo. App., 11;
King v. *Phoenix Ins. Co.,* 195 Mo., 290, 309;

We submit, therefore, that, in the present case, any attempt by Congress to prescribe the manner of proving copies of railway tariffs in state courts would be of no effect because beyond the powers granted that body by the Federal Constitution.

Moreover, even if it could be held in the face of these authorities that Congress might under certain circumstances have such power, surely the power is such a doubtful one that its exercise should not be based upon implication. Not having expressed such intention, Congress should not be held to have intended to attempt its exercise in enacting section 16 of the Interstate Commerce Act. The provisions therein which prescribe the manner and certification of copies of tariffs and schedules filed with the Interstate Commerce Commission, and making copies so certified admissible in evidence in all judicial proceedings have ample scope in their application to the Federal courts over which Congress has exclusive and unquestioned jurisdiction to prescribe rules of evidence. They should not be stretched by implication to cover even doubtful ground.

Inasmuch, therefore, as the Federal statute is not binding upon the state courts, it is not involved in the decision in any way, and whether or not the Kansas City Court of

Appeals erred in holding that the copies of defendant's tariffs and schedules offered in evidence were not properly certified under that statute, is a question which does not challenge the attention of this court. Defendant was not entitled to have the state courts pass on the admissibility of the copies of its tariffs under the Federal statute, and the Court of Appeals could not bring that matter into the case by its holding. The question of their admissibility is one of general law and not one of Federal cognizance.

IV.

The Kansas City Court of Appeals did not rule against the defendant upon the construction of any Federal statute or the existence of any Federal right. That court admitted the right claimed by defendant but found that defendant had failed to prove the facts necessary to bring the case within the operation of that right. Such decision does not involve a Federal question.

The right claimed by the defendant in this case is that its liability for the plaintiff's baggage was limited by the conditions and provisions contained in defendant's tariffs and schedules. This right depended upon the proper filing of these tariffs with the Interstate Commerce Commission and their publication according to law. The Kansas City Court of Appeals expressly conceded the right as claimed by the defendant (Record, p. 91), but found that defendant had failed to prove the facts necessary to bring the case within that right because the evidence offered to prove the filing of the tariffs and their contents was incompetent, while no evidence whatever was offered to prove their

publication (Record, pp. 91-92.) The question at issue in the state court, therefore, did not involve, but was merely preliminary to the consideration of a Federal question.

In *Smith* v. *Adsit,* 23 Wallace, 368, the plaintiff alleged that the defendant had sold certain land in violation of the Act of Congress and suit was brought to enforce a trust. The state court dismissed the bill on the ground that no trust was proved. In holding that no Federal question was involved this court said (pp. 373, 374):

> "The record does not show that the question whether the sale of the land warrant was a nullity if made before the warrant issued, was passed upon, much less that it was decided against the complainant. * * * What amounts to a trust or out of what facts a trust may spring are not Federal questions, and on a writ of error to a state court we can review only decisions of Federal question."

In *Mining Company* v. *Boggs,* 3 Wallace, 304, the plaintiff brought suit for the possession of certain mineral lands, and recovered judgment in the state courts. The defendant claimed the property under an implied license from the United States, and brought the case to this court. It was held that this court had no jurisdiction, the court saying (p. 310):

> "However that may be, there was no decision of the court against the validity of such a license. The decision was that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law."

So in *Crary* v. *Devlin*, 154 U. S., 619, the court said:

> "The motion to dismiss this cause is granted upon the authority of *Mining Co.* v. *Boggs*, 3 Wall., 304. There could have been no decision of the Court of Appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation."

The principle upon which the above cases were decided should lead to the dismissal of the writ of error in the present case. It was there held that if the ruling of the state court does not question the validity of the Federal right claimed, but decides merely that the facts necessary to bring the case within the right fail to exist, the case does not involve a Federal question. In the case at bar the Kansas City Court of Appeals did not question the right of the defendant to limit its liability in the carriage of the plaintiff's baggage; it found that the defendant failed to prove the facts necessary to establish that right.

We submit that a Federal question is not involved in this case, and we respectfully ask that the writ of error be dismissed.

Respectfully submitted,

JUSTIN D. BOWERSOCK,

ROBERT B. FIZZELL,

Attorneys for Defendant in Error.

[redacted]

Supreme Court of the

[redacted]

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Brief on Behalf of Defendant

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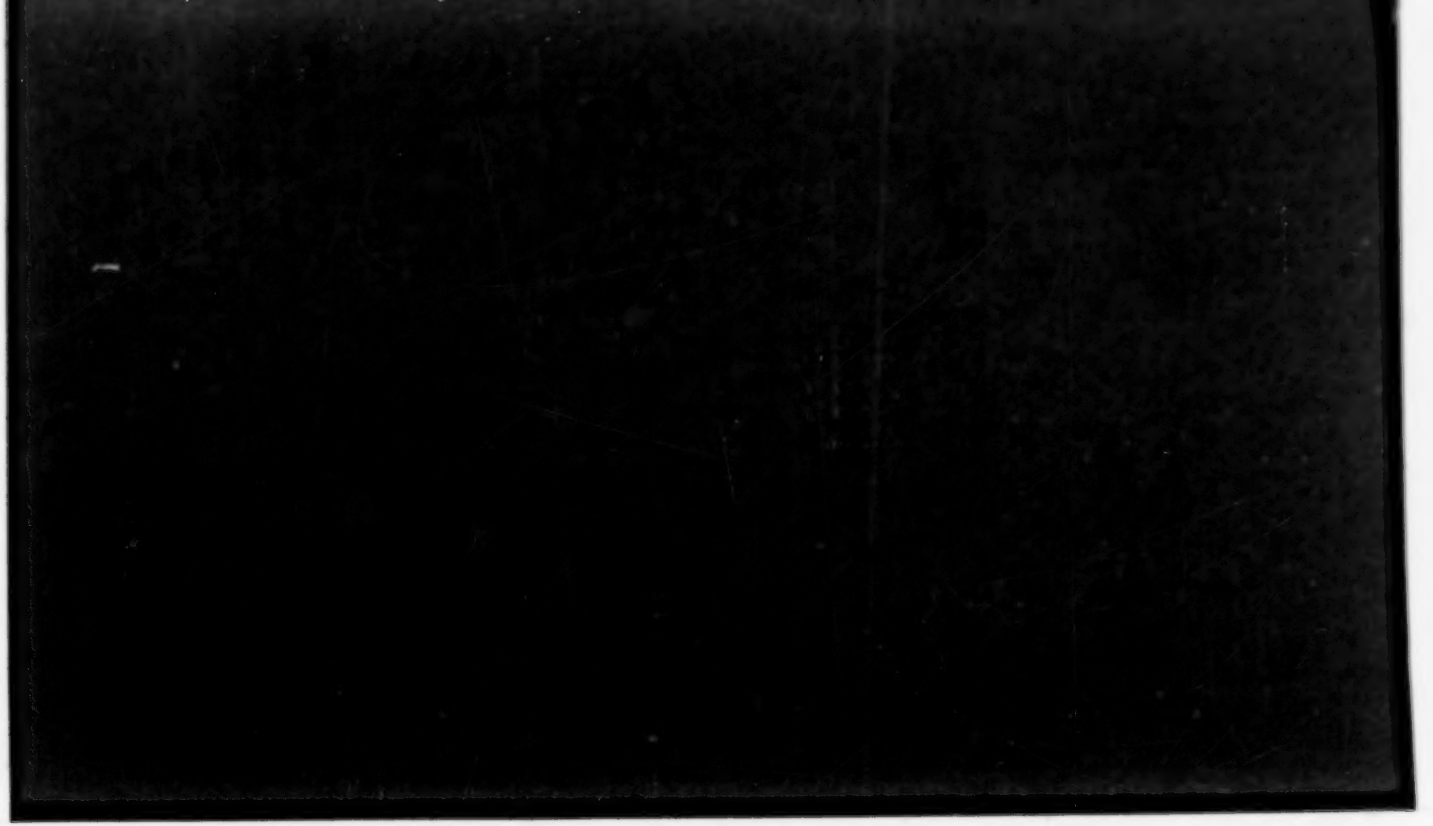

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TABLE OF CASES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Plaintiff in Error,

v.

No. 118

MARY EDNA BEAHAM,

Defendant in Error.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

Brief on Behalf of Defendant in Error.

STATEMENT OF FACTS.

On February 11, 1911, defendant in error (hereinafter referred to as plaintiff) instituted this action in the Circuit Court of Jackson County, Missouri, against the plaintiff in

error (hereinafter referred to as defendant) to recover the value of a trunk and its contents checked for her by the defendant for transportation from New York to Kansas City, and lost in transit.

The petition set out that the plaintiff on September 9, 1910, purchased from the defendant in New York City, at the Grand Central Station, a first-class ticket for Kansas City over the lines of the defendant (and connecting lines) and checked her trunk to destination over the same route; that the trunk was lost in some way and never delivered to plaintiff; and that she was damaged thereby in the sum of $1595.98, the value of the property so lost.

The answer set up certain provisions contained in the ticket sold to plaintiff and in the baggage check held by her, purporting to limit defendant's liability for loss of baggage to $100, unless a greater value was declared and paid for (Record, p. 7). The answer further set up certain tariffs alleged to have been in force during the month of September, 1910, published and filed by defendant in the office of the Interstate Commerce Commission, which tariffs contained a limitation of liability for baggage on interstate shipments of $100.00, unless the passenger expressly stipulated for a greater value and paid the charges thereon in accordance with schedules appearing in said tariffs. (Record, pp. 8-11.)

The reply denied that said tariffs were published and filed and in full force and effect, as alleged by defendant. (Record, p. 13.)

The case was tried before the court without a jury. At the trial, the defendant offered in evidence certain papers purporting to be copies of tariffs, including schedules, filed by it with the Interstate Commerce Commission. These papers contained the limitation of liability pleaded in the answer. The plaintiff objected to the introduction of all these

purported copies on the ground that they were not properly certified. (Record, pp. 32-38, 49, 58, 65, 68.) The certificates were made by the chairman of the Commission (Record, pp. 36, 58, 67) and did not purport to show that the chairman was the custodian of its records. In one instance, the certificate did not even recite that the original was on file with the Commission. (Record, p. 58.)

The trial court deferred ruling on the admissibility of these papers, saying that the question could be taken up in the briefs of counsel. (Record, p. 33). Thereafter, the court overruled all of plaintiff's objections to evidence (Record, p. 73), but gave an unqualified declaration of law that the plaintiff was entitled to recover the reasonable value of her trunk and its contents. (Record, p. 74.) Judgment was accordingly rendered for plaintiff in the sum of $1751.52 (Record, p. 14), the amount sued for, with interest.

The trial court did not find that the tariffs relied upon by defendant to limit its liability were duly published and filed with the Commission and in full force and effect as alleged in the answer. The defendant in its declaration of law, numbered III (Record, pp. 75-77), requested such a finding, but the court refused to make it. The court did give a declaration, however, (numbered 4) at the request of plaintiff, that "even if" the tariffs were properly filed and posted, plaintiff would still be entitled to recover the reasonable value of her baggage. (Record, pp. 74-75.)

From the judgment for plaintiff in the trial court the defendant appealed to the Kansas City Court of Appeals, which affirmed the judgment below in an opinion by Judge Ellison. (Record, pp. 88-93.)

The sole question presented and decided in the Kansas City Court of Appeals is whether or not the circuit court correctly gave the peremptory declaration of law for

plaintiff shown at page 74 of the record. This declaration is as follows:

> "The court declares the law to be that under the pleadings and evidence in this case, plaintiff is entitled to recover from the defendant an amount which represents the reasonable value of her trunk and the reasonable value of such articles contained therein as constituted baggage."

The defendant attacked this peremptory declaration on the ground that the circuit court had erroneously disregarded the tariffs limiting defendant's liability. Plaintiff, on the other hand, contended that the trial court properly disregarded them in arriving at its decision because the papers offered were not properly certified copies, and were, therefore, not admissible in evidence. This question was briefed and argued on its merits, and the plaintiff's position was sustained, the Court of Appeals holding that the papers offered were in fact incompetent. The judgment of the circuit court which disregarded the limitations contained in the alleged tariffs was, therefore, affirmed.

The effect of conditions and limitations of liability contained in tariffs governing interstate commerce and filed and published as provided by the Interstate Commerce Act was determined in this court in *Boston & Maine Railroad* v. *Hooker,* 233 U. S., 97. The binding effect upon the state court of this decision was never questioned by plaintiff, nor is it properly an issue now in this cause. Its force was expressly recognized in the opinion of the state court. (Record, p. 91.) The decision of the Kansas City Court of Appeals was based, not upon the question involved in the Hooker case, nor upon any determination of rights involved in that case, but was based wholly on the inadmissibility of evidence offered by the defendant.

This question of evidence decided against defendant in the Kansas City Court of Appeals was whether the purported copies of defendant's tariffs were admissible in the state court. The present writ of error brought by the defendant asks this court to pass upon that question. Defendant contends that under a provision of Section 16 of the Interstate Commerce Act of 1887, as amended June 29, 1906, (34 Sts. at Large 584, Chap. 3591) and June 18, 1910, (36 Sts. at Large 539, Chap. 309) the papers offered were properly certified and were admissible in evidence. This provision reads as follows:

> "The copies of schedules and classifications and tariffs * * * filed with the commission as herein provided, * * * shall be preserved as public records in the custody of the secretary of the commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of or extracts from any of said schedules, classifications, tariffs, * * * certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals."

Defendant contends that under this provision of the Interstate Commerce Act the papers offered as copies of its tariffs bearing the certificate of the chairman of the Commission were admissible in evidence, and could not be disregarded. Plaintiff contends, on the contrary, that under the statute such papers were not properly certified, were inadmissible in evidence, and were rightly disregarded by the state court.

POINTS AND AUTHORITIES.

I.

The decision of the Kansas City Court of Appeals that the purported copies of defendant's tariffs offered in evidence were inadmissible, was correct under the provisions of Section 16 of the Interstate Commerce Act.

Sec. 16, Interstate Commerce Act, as amended June 29, 1906, (34 Sts. at L., 584, Chap. 3591), and June 18, 1910, (36 Sts. at L., 539, Chap. 309).

Smith v. *United States,* 5 Peters, 292, l. c. 300;

Painter v. *Hall,* 75 Ind., 208;

State of Missouri v. *Foreman,* 121 Mo. App., 502;

Priest v. *Capitain,* 236 Mo., 446, l. c. 465;

Lothrop v. *Blake,* 3 Pa. St., 483;

Morris v. *Patchin,* 24 N. Y., 394;

Willock v. *Wilson,* 178 Mass., 68;

Ensign v. *Kindred,* 163 Pa. St., 638;

Edwards v. *Smith,* 137 S. W., 1161 (Tex. Civ. App.);

Kansas Pac. Ry. Co. v. *Cutter,* 19 Kan., 83;

Adams v. *Heckscher,* 80 Fed., 742;

Murdock v. *Hillyer,* 45 Mo. App., 287.

II.

The purported copies of defendant's tariffs offered in evidence were not admissible at common law.

United States v. *Percheman,* 7 Peters, 51;

New York Dry Dock v. *Hicks,* 5 McLean, 111, 18 Fed. Cas., No. 10.204;
Rich v. *Lancaster Railroad Co.,* 114 Mass., 514;
Inhabitants of Foxcroft v. *Crooker,* 40 Me., 308;
3 Wigmore on Evidence, Secs. 1674, 1677.

III.

Defendant's contention that the plaintiff's objections to the purported copies were not sufficiently specific, does not involve a Federal question, was not raised in the Kansas City Court of Appeals, and is not borne out by the record.

State v. *Foreman,* 121 Mo. App., 502, l. c. 509, 510.

IV.

Defendant's contention that the plaintiff, having failed to appeal from the ruling of the trial court admitting certain papers, could not urge their incompetency in the Kansas City Court of Appeals, does not involve a Federal question, and is without merit.

Lee v. *Mo. Pac. Ry. Co.,* 67 Kan., 402;
Gillett v. *Burlington Ins. Co.,* 53 Kan., 108;
Nance v. *Oklahoma Fire Ins. Co.,* 31 Okla., 208;
Huntington Nat. Bank v. *Loar,* 51 W. Va., 540.

V.

Defendant's contention that the plaintiff was estopped in the Kansas City Court of Appeals to point out the incom-

petency of the evidence disregarded by the trial court, does not involve a Federal question, and is without merit.

Fehlhauer v. *City of St. Louis,* 178 Mo., 635;
Vinson v. *Scott,* 198 Ill., 542;
Columbus State Bank v. *Carrig,* 3 Neb., 592 (unofficial), 92 N. W. 324;
Cowen v. *Eartherly Hardware Co.,* 95 Ala., 324;
Myers v. *Hale,* 17 Mo. App., 204;
Vaughan v. *Daniels,* 98 Mo., 230;

BRIEF OF ARGUMENT.

Assuming that this court has jurisdiction in this case, what is the question now presented for decision? Counsel for the plaintiff in error (referred to hereafter as the defendant) have lost sight of the distinction in this court "between writs of error to a court of the United States, and writs of error to the highest court of a state." *Central Land Co.* v. *Laidley,* 159 U. S., 103 l. c. 109. This case involves the correctness of the decision of the Kansas City Court of Appeals, and, therefore, only questions of a Federal nature can be reviewed. Questions of general law are not matters of concern in this court.

As is said by this court in *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86, l. c. 97-98:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court of error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. * * * We shall not, therefore, undertake to follow counsel in the consideration of all the questions argued, but shall limit our review to questions of a Federal nature which we deem to be properly made in this record and essential to the decision of the case."

So in *Sauer* v. *City of New York,* 206 U. S., 536, l. c. 546:

> "This court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the

highest courts of the States except to a very limited extent and for a precisely defined purpose. * * * It was from this provision (Article III) of the Constitution that Marshall in *Cohens* v. *Virginia*, 6 Wheat., 264, derived the power of this court to review the judgments of the courts of the States, and in defining the appellate jurisdiction the Chief Justice expressly limited it to questions concerning the Constitution, laws and treaties of the United States, commonly called Federal questions, and excluded altogether the thought that under the Congressional regulation the jurisdiction included any power to correct any supposed errors of the state courts in the determination of the state law."

The numerous questions raised by counsel in their brief for the defendant as to the sufficiency of the plaintiff's objections to the admission in evidence of the purported copies of defendant's tariffs (pp. 60-67), the right of the Kansas City Court of Appeals to disregard incompetent evidence in the absence of an appeal by the plaintiff from the judgment in her favor (pp. 67-69), the correctness of the ruling of the Court of Appeals that the plaintiff was not estopped to sustain the judgment under the peremptory instruction of the trial court in her favor (pp. 70-71), the admissibility of the purported copies of tariffs in evidence as a question of common law, apart from any Federal statute (pp. 72-78, 85-90, 94-97), the question of judicial notice in the state courts (pp. 90-94)—these are questions of state, not Federal law, and the decision of the state court thereon is final. This court does not have power "to correct mere errors in the trials in state courts although affirmed by the highest state courts. This court is not a general court of appeals with the general right to review the decisions of state courts."

St. Louis, I. M. & So. Ry. Co. v. *Taylor*, 210 U. S., 281, 291.

We shall ultimately take up these various contentions of defendant's counsel for, although this court has no jurisdiction of the questions of general law raised by counsel, we believe that the rulings of the state court thereon are correct. We shall first pass directly, however, to what we conceive to be the *only* issue in this cause which can possibly involve a Federal question.

I.

The decision of the Kansas City Court of Appeals that the purported copies of defendant's tariffs offered in evidence were inadmissible, was correct under the provisions of Section 16 of the Interstate Commerce Act.

Section 16 of the Interstate Commerce Act, as amended June 29, 1906, (34 Sts. at L., 588, Chap. 3591), and June 18, 1910 (36 Sts. at L., 539, Chap. 309), prescribes the manner of proving copies of tariffs filed with the Interstate Commerce Commission. If it be held (as we are assuming in this argument upon the merits) that such provision was intended by Congress to apply to actions in the state courts, and that in enacting it Congress was within its constitutional powers, then it was the duty of the Kansas City Court of Appeals to follow the Federal statute, and whether or not it did so in the present case is a Federal question. We believe that the decision of the Court of Appeals was correct under the Federal enactment referred to, and that the defendant was not denied any right given it by said statute.

Section 16 provides as follows:

> "The copies of schedules and classifications and tariffs * * * filed with the commission as herein provided, * * * shall be preserved as public records in the custody of the secretary of the commission,

and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of or extracts from any of said schedules, classifications, tariffs, * * * *certified by the secretary*, under the commission's seal, shall be received in evidence with like effect as the originals." (Italics ours.)

The papers which purported to be copies of defendant's tariffs and schedules and which were offered in evidence in the trial court were not certified by the secretary of the commission as the Act provides, but purported to be certified by the chairman. (Record, pp. 26, 56, 67.) None of the certificates showed that the chairman was the custodian of the original records—indeed the statute expressly makes the secretary such custodian. One certificate (Record, p. 56) did not even show where the original papers were filed. It follows therefore, that the papers offered were not certified according to the Federal Act, and were not competent evidence under its terms.

The rule is fundamental that statutory provisions governing the authentication of records must be followed with the utmost strictness.

In *Smith* v. *United States*, 5 Peters, 292, this court said (p. 303):

> "Where copies are made evidence by statute, the mode of authentication required must be strictly pursued. The legislature may establish new rules of evidence, in derogation of the common law, but the judicial power is limited to the rule laid down."

In *Forster* v. *Hall*, 75 Ind., 398, records kept in a public office within the state could, by virtue of a statute,

be proved by the attestation of the keeper of the instruments "that the same are *true and complete* copies of the instruments in his custody." It was held that the certificate of an auditor that certain assessment lists were *true* copies of the lists on file in his office was insufficient, and that the papers were not admissible in evidence. The court said (p. 214):

> "Where the statute prescribes the mode of authentication, no other mode will do."

A question similar to that presented in the case at bar has frequently arisen under Section 905, Rev. Sts., U. S., concerning the authentication and proof of the judicial proceedings of a state court. Under said Act, such proceedings shall be proved in the courts of any other state by the attestation *of the clerk*, with the seal of the court, and the certificate of the judge that the attestation is in due form. In a number of cases it has been held that a record attested by a deputy clerk of the court, instead of by the clerk, is not admissible. These cases are especially applicable to the case at bar.

In *State of Missouri* v. *Foreman*, 121 Mo. App., 502, the court so held saying (p. 509):

> "The Act of Congress requires that the clerk shall make the certificate. This means that the clerk *himself* shall do so, and not by or through his deputy. * * * The clerk derives his authority from the law of Congress, and not the law of the state."

The above case is cited with approval in the recent case of *Priest* v. *Capitain*, 236 Mo., 446, l. c. 465.

In *Lothrop* v. *Blake*, 3 Pa. St., 483, it was likewise held that the transcript of an Ohio judgment could not be properly certified by a deputy clerk, although an Ohio statute enabled the deputy to perform the duties of his principal, the court saying (p. 495) that to admit the record under the Ohio statute "would enable the several states to alter and control an Act of Congress."

The same rule is laid down in

Willock v. *Wilson*, 178 Mass., 68;
Morris v. *Patchin*, 24 N. Y., 394;
Ensign v. *Kindred*, 163 Pa. St., 638;
Edwards v. *Smith*, 137 S. W., (Tex. Civ. App.), 1161;
Kansas Pac. Ry. Co. v. *Cutter*, 19 Kan., 83.

In the New York and Massachusetts cases just cited, it was held that the certificate of the judge that the attestation was in due form would not cure the defective certification by a deputy clerk.

The cases discussed above illustrate the strictness with which the courts enforce this statutory provision. A deputy clerk is a ministerial officer who can in general perform the duties of his principal. Thus, it is held in the Federal courts, where the Federal statute referred to does not apply, that a deputy clerk may certify to copies of judicial proceedings in his court. *National Acc. Soc.* v. *Spiro*, 94 Fed., 750. But the rule is firmly established that under a *statute* requiring the certificate of the clerk, that of his deputy is not sufficient.

A similar rule is established in Missouri under Section 1778, Rev. Sts., Missouri, 1909, providing for personal service upon non-resident defendants. By said statute service shall be proved by the affidavit of the officer making it, such affidavit to be made before *the clerk* or judge of the court of which affiant is an officer. Such clerk or judge shall certify to the official character of the affiant, and attest the same with the seal of the court. It is held that the language of this statute must be literally construed, and that a certificate made by a deputy clerk, instead of the clerk, is insufficient.

Priest v. *Capitain*, 236 Mo., 446;
Adams v. *Heckscher*, 80 Fed., 742;
Murdock v. *Hillyer*, 45 Mo. App., 287.

In the case at bar the purported copies of tariffs offered in evidence by the defendant were not certified in accordance with the Federal statute. The Act expressly names the secretary of the Interstate Commerce Commission as the person to certify copies of the tariffs filed with the Commission. The papers offered by the defendant were certified to by the chairman of the Commission—an officer who did not have the custody of the originals, and who was not authorized, either at common law or by statute, to authenticate the papers in question.

We submit that the Kansas City Court of Appeals ruled correctly upon the only issue in this cause which can possibly involve a Federal question, and we respectfully ask that the judgment of that court be affirmed.

II.

The purported copies of defendant's tariffs offered in evidence were not admissible at common law.

We believe that the foregoing discussion of the effect of Section 16 disposes of the only issue which can possibly involve a Federal question in this cause. Whether or not such papers were admissible apart from the Federal statute, and as a matter of common law, is a question in the general law of evidence with which this court has no concern.

Los Angeles Farming & Milling Co. v. *City of Los Angeles,* 217 U. S., 217;
Central Vermont Ry. Co. v. *White,* 238 U. S., 507, l. c. 515.

However, inasmuch as counsel for defendant have gone outside this Federal question and have argued the matter of admissibility generally, we wish to point out that the purported copies, certified by the Chairman of the Interstate Commerce Commission were not admissible at common law, apart from statute.

A copy of an original paper, though certified, is nevertheless only secondary, hearsay evidence, unless it is proved to be a copy by a witness testifying under oath, subject to cross examination. Accordingly the traditional common law rule was to reject all certificates and certified copies as evidence except when made with express authority. 3 Wigmore on Evidence, Secs. 1674, 1677. In the

United States, however, there has become established, as an exception to the hearsay rule, the principle that

> "The lawful custodian of a public record has, by implication of his office, and without express order, an authority to certify copies."
>
> 3 Wigmore on Evidence, Sec. 1677, p. 2102.

The fundamental condition on which this exception to the hearsay rule is based is that the certificate be made by the public officer *having the custody of the original instrument to which he certifies.* The latter's power to authenticate copies is implied solely from his office of custodian of the original document. This was stated clearly by Chief Justice Marshall in *United States* v. *Percheman,* 7 Peters, 51, a case which did much to establish the principle in this country. The court said (pp. 84, 85):

> "At the trial the counsel for the claimant offered in evidence a copy from the office of the keeper of public archives of the original grant on which the claim is founded. * * *
>
> We think that on general principles of law a copy given by a public officer *whose duty it is to keep the original* ought to be given in evidence." (Italics ours.)

Literally scores of cases could be cited to show that it is only the custodian of the original instrument, who may certify to copies so as to make them admissible in evidence without further proof. The case of *New York Dry Dock* v. *Hicks,* 5 McLean, Ill., 18 Fed. Cases, p. 151, Fed. Case No. 10204, states the unquestioned rule:

> "The law authorized the deed to be recorded at first by the register of probate, but the records kept

by him have been transferred by law to the register of deeds and they are now legally in his custody. Under such circumstances the keeper of the records may certify copies the same as the register of probate might have certified had he retained the custody of the original records. The law which makes copies evidence when duly certified is satisfied by the certificate of the person who has the legal custody of the records. *No other individual could certify copies. This right appertains to him from the legal possession of the records.*" (Italics ours.)

The rule is thus stated in 3 Wigmore on Evidence, Sec. 1677, p. 2103:

> "The certifier must be the lawful custodian of the particular document; his authority, then, is to be sought in the administrative law which declares the duties of the various officers."

The Interstate Commerce Act, Sec. 16, makes the secretary of the commission the lawful custodian of all records filed with the commission. The chairman of that body has no more authority to certify to copies of such records than a court would have to certify to papers filed with and under the custody of the clerk.

In *Rich* v. *Lancaster Railroad Co.*, 114 Mass., 514, a paper certified by the chairman of the board of county commissioners was held inadmissible, the court, through Chief Justice Gray, saying (p. 514):

> "The clerk and not the chairman of the county commissioners was the proper officer to make records of their doings and to attest copies thereof. The memorandum of their action, not being the original record,

> nor certified by their clerk, nor proved by the oath of any one who had examined the original to be a true copy, was wrongly admitted in evidence."

So in *Inhabitants of Foxcroft* v. *Crooker,* 40 Me., 308, the court held (p. 310):

> "The copy of the record of the proceedings of the selectmen is attested by the chairman, who is not a recording officer, and his attestation is not the proper verification of a record."

Since, then, in the case at bar, the purported copies were not certified by the custodian of the original records but by a wholly separate and different officer, they did not come within the exception to the hearsay rule, and were properly held incompetent by the Kansas City Court of Appeals.

We have carefully examined the cases cited in defendant's brief, but in none of them was a certified copy of a public record held admissible unless authenticated by the custodian or keeper of the original. A number of the cases cited specifically recognize the rule as stated above. *U. S.* v. *Perchman,* 7 Pet., 85 (Brief, p. 76), *U. S.* v. *Wiggins,* 14 Pet., 346 (Brief, p. 77), *U. S.* v. *Richards,* 4 Dallas, 415 (Brief, p. 79), *Meehan* v. *Forsyth,* 24 Howard, 175 (Brief, p. 81). Other cases cited by counsel merely illustrate the general principle that official documents purporting to be printed by the official printer under the authority of the government are admissible without further authentication. 3 Wigmore on Evidence, Sec. 1684. Still other cases fall within other well recognized exceptions to the hearsay rule which are not involved in this case, and which we do

not pause to examine in detail because the question here in issue concerns only purported copies of public records, not authenticated by the keeper of the original papers. Under no theory are such papers admissible.

Counsel for the defendant have suggested that the secretary of the Interstate Commerce Commission was dead and for this reason the papers offered were competent. No evidence of this fact was offered, however, and, of course, the mere statement of counsel cannot take the place of competent legal proof of the fact, if it was a fact. *Hewit v. Bank of Indian Ter.*, 64 Neb., 463, l. c. 472. The suggestion that the state courts of Missouri will be compelled by this court to take judicial notice of any death occurring in such office (Def.'s Brief, pp. 90-94) does not deserve serious consideration.

Moreover, assuming that this court will review the decision of the state courts on a question of the admissibility of evidence at common law, and will hold that the state courts were bound to take judicial notice of the death of the secretary of the Interstate Commerce Commission, the fact of such death did not give the chairman of the commission power to authenticate copies of tariffs. Under the established rule of the common law, only the legal custodian of public records may authenticate copies, and the Chairman of the Interstate Commerce Commission was not such officer in the present case. There is nothing in the Act giving the chairman or other individual member of the Commission any authority whatever over its records. The papers offered by the defendant did not even purport to be authenticated by the custodian of the original records. They were therefore inadmissible in evidence, and the Kansas City Court of Appeals correctly so held.

III.

Defendant's contention that the plaintiff's objections to the purported copies were not sufficiently specific, does not involve a Federal question, was not raised in the Kansas City Court of Appeals, and is not borne out by the record.

When the defendant offered the papers in evidence, the plaintiff objected to their introduction on the ground that they were not properly certified (Record, pp. 32-38, 49, 58, 65, 68). The Court of Appeals considered this question on its merits and held that the papers were not properly certified and were inadmissible (Record, pp. 91-92). Defendant now contends that the plaintiff's objections to the admissibility of the papers offered were not sufficiently definite (Def.'s Brief, pp. 60-67).

We submit that the question of how specific an objection to evidence must be made in the trial of a case in a state court, is not an issue arising under the Constitution and laws of the United States. A question so peculiarly dependent upon state rules and state practice cannot possibly constitute a federal question subject to review in this court. This court has no jurisdiction to pass upon the point.

Furthermore, the contention now urged by counsel was not presented in the state court but appears for the first time in this tribunal. The question was argued and decided upon its merits in the Kansas City Court of Appeals, and the argument that plaintiff's objections were not sufficient to demand the consideration of the question on appeal comes too late.

Moreover, under the decision in *State* v. *Foreman*, 121 Mo. App., 502, l. c. 509, 510, a purported copy of a public

record, not properly certified, is inadmissible for any purpose, and a general objection is sufficient to save the exception to its reception.

IV.

Defendant's contention that the plaintiff, having failed to appeal from the ruling of the trial court admitting certain papers, could not urge their incompetency in the Kansas City Court of Appeals, does not involve a Federal question, and is without merit.

At the trial of this cause in the circuit court, the court admitted certain papers over the plaintiff's objections. These papers, as we have pointed out, were not properly certified and were incompetent. In its final decision, however, the trial court disregarded the evidence which it had improperly admitted, and gave judgment for the plaintiff. This judgment was sustained by the Court of Appeals. Defendant now contends that because the plaintiff failed to appeal from the rulings of the trial court overruling her objections to the papers, she could not object to their competency in the appellate court (Def.'s Brief, pp. 67-69).

Here, again, the contention does not involve a Federal question. Whether the plaintiff should (or could) have appealed from a judgment in her favor, whether she could sustain the peremptory finding of the trial court in her favor by pointing out its correctness on all of the competent evidence in the case, whether the Court of Appeals could affirm the judgment as being for the right party, these are questions of state law, and can not be reviewed in this court.

The ruling of the state courts, however, was correct. Plaintiff did not seek, on the appeal, to take advantage of any errors committed against her. The trial court gave judgment for the plaintiff as prayed in her petition, and she could not have appealed from the judgment had she so desired. She was not "aggrieved by judgment" in her favor, and only such party can appeal (Rev. Stats. Mo., 1909, Section 2038). Plaintiff relied entirely upon the peremptory finding of the lower court in its first declaration of law, namely, that under the pleadings and the evidence the plaintiff was entitled to recover the actual value of her baggage.

Whether the trial court properly gave a peremptory declaration of law for the plaintiff was a question to be decided upon the *competent* evidence in the case. The Court of Appeals was not bound to close its eyes to the correctness of the judgment of the trial court, and to reverse the judgment because the trial court erroneously admitted incompetent evidence which it later disregarded. The mere statement of the proposition seems sufficient, but authorities directly in point are not wanting.

In *Lee* v. *Mo. Pac. Ry. Co.*, 67 Kan., 402, plaintiff, a child, sued for personal injuries, and on cross examination stated that he did not know the nature of an oath. Defendant thereupon moved to strike out all of plaintiff's testimony as incompetent, but the lower court refused to allow this. The trial court did, however, sustain defendant's demurrer to the evidence, and plaintiff appealed. The defendant, of course, did not appeal. The question under discussion was specifically presented for the court said that not considering the plaintiff's testimony, the lower court prop-

erly sustained defendant's demurrer, but that "probably, if this testimony is to be considered, the demurrer should have been overruled." The Supreme Court then passed upon the competency of plaintiff's testimony, held that it was incompetent, and sustained the judgment for respondent. In the syllabus the court stated the rule applicable to the case at bar:

> "A ruling sustaining a demurrer to the evidence will not be reversed, notwithstanding that sufficient evidence was actually admitted by the trial court to make a *prima facie* case for plaintiff, where a part of the evidence essential for that purpose was incompetent and admitted over proper objection, although it was not formally stricken out, and no notice was given plaintiff that it was to be disregarded."

Again, in *Gillett* v. *Burlington Ins. Co.*, 53 Kan., 108, plaintiff sued on an insurance policy and the defense was plaintiff's failure to furnish proof of loss. At the trial plaintiff offered evidence to show a waiver of the provision for furnishing proof of loss, and the court admitted this evidence over defendant's objections. Defendant demurred to plaintiff's evidence and the trial court sustained the demurrer. Plaintiff appealed, claiming that the evidence of waiver in the case made it error for the trial court to sustain defendant's demurrer. The defendant did not appeal. The supreme court examined the evidence of waiver, held that it was incompetent, and affirmed the judgment for defendant, saying:

> "The admissibility of the testimony was fairly challenged and the objection should have been sustained. It was within the province of the court to correct the

error at any time before final disposition of the case, and it was not improper to strike out or to disregard the incompetent testimony upon demurrer to the evidence. As the plaintiff failed to establish an essential element of her case, it must be held that the district court ruled correctly in sustaining the demurrer."

The same view was taken in *Vance v. Oklahoma Fire Ins. Co.*, 31 Okla., 208, the court saying:

"In considering a demurrer to the evidence, a trial court may disregard incompetent testimony admitted over proper objections; and, on appeal to this court from a ruling sustaining a demurrer to the evidence, incompetent evidence admitted over objection will not be considered for the purpose of reversing such ruling, and, if the competent evidence admitted fails to make out a *prima facie* case for the party against whom the demurrer is directed, the ruling of the trial court will be sustained." (Citing authorities.)

Again, in *Huntington Nat. Bk. Case*, 51 W. Va., 369, the court, in the syllabus, said:

"Upon a demurrer to evidence, in applying the rule laid down by this court in *Board v. Railway Co.*, 46 W. Va., 655, the demurree is not entitled to the benefit of evidence offered in the case by him, not to any inferences to be drawn therefrom, which evidence is incompetent and inadmissible, but which has been improperly admitted over the objection of demurrant."

The decisions in the four cases cited above are directly applicable to the present case. In each of them the appellant desired the court of review to abrogate its functions as a court in considering the merits of the entire case, and to reverse the ruling below in favor of the respondent although that ruling was correct upon all of the competent evidence in

the case. In each of them the judgment below was affirmed.

In the case at bar the judgment of the trial court was for the right party upon all of the competent evidence in the case. If the Court of Appeals had reversed the judgment, the amazing result would have been a case reversed because the trial court disregarded *incompetent* evidence *offered by the losing party.* We submit that the Court of Appeals correctly refused to so hold, and rightly affirmed the judgment for the plaintiff.

V.

Defendant's contention that the plaintiff was estopped in the Kansas City Court of Appeals to point out the incompetency of the evidence disregarded by the trial court, does not involve a Federal question and is without merit.

At the trial of this case the court gave a declaration of law (numbered 4) for the plaintiff that "even if" the defendant's tariffs were filed and posted, the plaintiff would still be entitled to recover the reasonable value of her baggage (Record, pp. 74-75). Defendant now contends that by asking and obtaining this declaration, plaintiff was estopped in the Court of Appeals to point out the incompetency of the purported copies of papers offered in evidence by defendant and objected to by plaintiff (Def.'s Brief, pp. 70-71).

The contention cannot possibly involve a Federal question. Whether or not the plaintiff was "estopped" in the Court of Appeals to raise certain points was a question for that court to decide.

Defendant's argument is without merit, however, because, on the competent evidence in the case, the defendant did not establish a defense to the cause of action, and the trial court properly gave a peremptory declaration of law for the plaintiff (Record, p. 74, Declaration of Law No. 1). In such a case, any error in the instructions given by the court is immaterial.

Thus, in *Fehlhauer* v. *City of St. Louis,* 178 Mo., 635, the plaintiff sued the city and others for injuries sustained when plaintiff fell in an open trap door in the walk. The city asked a peremptory instruction in its favor but this was refused, the court submitting the case to the jury under certain instructions. A verdict was returned for the defendant city and the plaintiff appealed, assigning as error an instruction given at the city's request. The Supreme Court, however, examined the plaintiff's case and found that on plaintiff's evidence the city was not liable so that the judgment below was affirmed, the court saying (pp. 649, 650):

> "Counsel for plaintiff contends that instruction numbered 5, given for the city, is erroneous and inconsistent with instruction numbered 1, given for the plaintiff. In view of the verdict on the facts disclosed by the evidence, we deem it unnecessary to set out these instructions, for the reason that upon the evidence the court ought to have directed a verdict for the defendant city, and the judgment in its favor being for the right party, ought not to be reversed for error in the instructions."

The syllabus to the case of *Vinson* v. *Scott,* 198 Ill., 542, accurately summarizes the rule:

"Where the jury could have rendered no other verdict under the evidence properly admitted, the judgment will not be reversed because of the admission of irrelevant evidence, or error in giving and refusing instructions."

Similarly, in *Columbus State Bank* v. *Carrig,* 3 Neb., 592 (unofficial), 92 N. W., 324, and in *Cowen* v. *Eartherly Hardware Co.,* 95 Ala., 324, it is held that where the plaintiff is entitled to an instructed verdict any errors in the instructions given are not material.

No principle is more firmly established than the one that a lower court which has ruled correctly will not be reversed because it assigned the wrong reason for its action. If the decision of the trial court was correct, the Court of Appeals properly affirmed that judgment though for reasons different from those relied upon by the lower court. The appellate court may itself give entirely new grounds for affirming the judgment below on the entire case.

Myers v. *Hale,* 17 Mo. App., 204;
Vaughan v. *Daniels,* 98 Mo., 230.

In the case at bar the plaintiff has suffered an actual loss, unquestioned by the defendant (Record, p. 30), of the amount awarded her by the trial court. The Kansas City Court of Appeals has held that the defendant failed to prove the facts necessary to limit its liability for the loss thus sustained. We submit that the decision of that court is correct, and we respectfully ask that the writ of error issued herein

be dismissed, or, if this court shall take jurisdiction of this cause, that the judgment of the state court be affirmed.

Respectfully submitted,

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